was a result: the payment to *C*, and was willing, as a business proposition, to take the credit of the bank, and secondly, because of the difficulty of proper treatment, by the banks concerned, of the claim against correspondent banks if it is to be regarded as a trust *res*. Are they to hold each claim in trust as a separate account until the money is actually received by *C*?

Perhaps the court in the principal case might be said to be bound by its previous special deposit cases[10] to follow the American rule, were it not for the fact that in a comparatively recent case, in a situation which is strictly congruous, if not, indeed, legally identical, it was held by the same court that there is a marked distinction between issuing a draft, traveller's check or "cable transfer" and receiving money for actual transmission, and that the seller of a cable transfer sells a credit for a sum of money, payable at a place indicated in the contract.[11] And a still more controlling basis for departure should be the nature of the exchange business itself.[12] If the relation set up is a fiduciary one, then the money deposited must be held as a separate fund until credit is secured from a correspondent bank, which bank will, in turn, be compelled to treat the claim as a trust claim and may not set off debits against it. The first operation would certainly be contrary to the whole basis of the banking business which depends upon the use of the money deposited with it; while as to the latter, the practical consideration of how to carry and adjust the claims between banks until the contract is performed and the credit paid at the foreign point is of much greater force, because the fact that there is a continuous transfer of enormous sums makes it impracticable to finance such operations as individual transactions without balancing accounts. Because it overlooks general business practices and the intentions of business men in such transactions, the rule in the principal case is unfair to an existing economic situation, and, it is submitted, should be modified so as to be more in line with modern conditions.

R. L. W.

THE DOCTRINE OF PURCHASE FOR VALUE AS APPLIED TO THE TRANSFER OF EQUITABLE INTERESTS.—In the recent case of *Casner* v. *Schwartz* (1918) 198 Mo. App. 237, 201 S. W. 592,[1] *A* executed and delivered to *B* two duplicate notes, each of which was for the entire amount of a loan made by *B* to *A*, and secured them by a conveyance to *X*, trustee.

[10] People *ex rel.* Zotti *v.* Flynn (1909) 135 App. Div. 276, 120 N. Y. Supp. 511; 10 Columbia Law Rev. 358.

[11] Strohmeyer & Arpe *v.* Guaranty Trust Co. (1916) 172 App. Div. 16, 157 N. Y. Supp. 955.

[12] In the dissenting opinion of the principal case, 173 N. Y. Supp. 814, Shearn, J., at p. 819: ". . . foreign exchange or credit is a subject of purchase and sale, and not only may be, but is commonly, contracted for in the same manner and governed by the same laws as in the case of purchase of wheat, cotton, or any other subject of commerce."

[1] The statement of facts is somewhat simplified.

This deed of trust[2] was to secure the payment of the amount of the loan as represented by either one of the two notes, but not the payment of both notes. *B* negotiated one note, which for convenience we will call Note No. 1, to *C*, with an endorsement which expressly assigned all rights under the deed of trust. *B* then negotiated the other note, Note No. 2, to *D* with a similar endorsement. *B* later bought back Note No. 1 from *C* and negotiated it to *E*, and, again, by his endorsement, purported to assign all rights under the deed of trust. In an action by *X*, trustee, to determine whether *D* or *E* had the prior right to the proceeds of the land held in trust, it was held that *D* had priority.

Where a mortgage or trust deed is given as security for a negotiable note, the transfer of the note carries with it the mortgage security.[3] Moreover, by the prevailing opinion, the innocent indorsee for value of the note will take free of all equities, collateral or inherent, existing against the transferor.[4] Consequently, if *B*, in the principal case, had forged Note No. 2, *D*, the transferee thereof, would have no rights against *A*, the apparent maker, or against the land held by *X* as trustee.[5] *D* would only have had, besides his action at law against *B* as endorser of the note, a cause of action in equity for the assignment of *B's* equitable rights in the land held in trust. Such a collateral equity would have been cut off by the endorsement of Note No. 1 by *B* to *E*, and *E* would have become entitled to the trust deed security. The principal case, however, presents a different situation. It is to be conceded that the transfer of Note No. 1 carried with it the security. As between *C* and *D*, therefore, the former had the priority.[6] But when *B* bought back the note from *C*, who was entitled to the security? Obviously, *D*. *B* could not sue

[2] "A deed of trust . . . is a conveyance to a person other than the creditor, conditioned to be void if the debt be paid at a certain time, but if not paid that the grantee may sell the land and apply the proceeds to the extinguishment of the debt, paying over the surplus to the grantor." 1 Jones, Mortgages (7th ed.) § 62. The creditor, it will be seen, gets but an equitable right, since the legal interest is vested in the trustee.

[3] 2 Jones, *op. cit.* § 834. The same is true as to deeds of trust. Bell *v.* Simpson (1882) 75 Mo. 485.

[4] Carpenter *v.* Longan (1872) 83 U. S. 271; Morris *v.* Bacon (1877) 123 Mass. 58; see Hagerman *v.* Sutton (1887) 91 Mo. 519, 4 S. W. 73; *contra,* Baily *v.* Smith (1863) 14 Oh. St. 396 (as to inherent equities). It is immaterial that the innocent purchaser of the note does not get an actual assignment of the mortgage or of the right under the trust deed, Morris *v.* Bacon, *supra.* The only distinction is that where there is an actual assignment, the assignee can proceed immediately to foreclose, while, if there is none, the holder of the note must proceed by compelling the holder of the mortgage to assign or foreclose. Clark *v.* Havard (1905) 122 Ga. 273, 50 S. E. 108; 2 Jones, *op. cit.* § 818; *cf.* Strong *v.* Jackson (1877) 123 Mass. 60.

[5] Himrod *v.* Gilman (1893) 147 Ill. 293, 35 N. E. 373; *cf.* Adler *v.* Sargent (1895) 109 Cal. 42, 41 Pac. 799.

[6] Southern Commercial Sav. Bank *v.* Slattery, Adm. (1902) 166 Mo. 620, 66 S. W. 1066; Quinn *v.* McCallum (1914) 178 Mo. App. 241, 165 S. W. 1115; 2 Jones, *op. cit.* § 871, pp. 298, 299.

A on Note No. 1, since *A* could defend on the ground that he was only liable on one of the notes and that he should only have to pay Note No. 2, which *D* held for value. *D*, therefore, had the only enforceable note against the maker, which the trust deed was given to secure. When *B*, however, negotiated Note No. 1 to *E*, the latter took it free from *A's* defenses against *B*. Both *D* and *E* could then recover on their respective notes against *A*, the maker. The question in final analysis is whether *D's* equitable right to the equitable security as against *B* was cut off by *B's* subsequent assignment to *E* of that equitable security.[7]

An innocent purchaser for value of land or chattels takes free of equities existing against the vendor.[8] The reason is that the purchaser has the legal title and as he did not act unconscientiously in procuring that title, equity cannot consider him charged with an obligation to hold for another.[9] Practically, the basis for this doctrine is the necessity for the free transfer of land and chattels under modern commercial conditions. The position of a purchaser for value of a *chose* in action has been shaped by the peculiar development of the law as to their transfer.[10] Originally they were not assignable. Later their transfer became possible by the device of a power of attorney, the revocation of which equity would prevent. Thus, as the assignee had to sue in the assignor's name and in his stead, it was natural to think of him as standing in the shoes of the assignor and subject to all the equities to which the assignor was subject. In comparatively recent times the assignee of a *chose* in action has been recognized as in fact the real owner, the transfer of such *choses* has become common, and under modern procedure a formal difficulty has been obviated by allowing the assignee to sue in his own name. The English and several American courts have not thought these considerations were such as to alter the time-honored position that the assignee got only the rights of the assignor, subject to all the equities to which he was subject. On the other hand, many American jurisdictions have thought that these various considerations were sufficient to justify a different result, namely, that an assignee of a *chose* in action, like the purchaser of a horse, should take free of collateral equities.[11]

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[7] B undoubtedly is estopped to set up in a suit by D, that he, B, did not have the security of the deed of trust at the time of his assignment to D. Inasmuch as an estoppel *in pais* generally is not held binding upon innocent purchasers for value from the one estopped, see Rutz *v.* Kehn (1892) 143 Ill. 558, 25 N. E. 957, it is submitted that nothing more is said than that D had had a collateral equity against B. Ewart, Estoppel, 200. The question remains whether the doctrine of purchase for value applies to transfers of equitable interests.

[8] Sales Act, § 24; Perry, Trust & Trustees (6th ed.) § 218.

[9] Langdell, Equity Pleading, 211 *et seq.*

[10] Williston, "Is the Right of an Assignee of a Chose in Action Legal or Equitable?" 30 Harvard Law Rev. 97 *et seq.*; 3 Columbia Law Rev. 581.

[11] For a compilation of authorities both in England and America, see Williston, *op. cit.*, p. 102; Ames, Cases on Trusts, 309, n. 2. That the assignee of a *chose* in action takes subject to inherent equities is universally assumed.

It is commonly said that the doctrine of innocent purchaser for value does not apply to the transfer of equitable interests. The maxim is, *"Qui Prior est tempore potior est jure."*[12] The application of this maxim is clear wherever the equities of the rival claimants are against the same person, either the legal or the equitable owner.[13] Thus, if *A* owns land or an equity of redemption (in a jurisdiction entertaining the common law theory of mortgages) and declares, first, that he holds in trust for *B*, and, subsequently, that he holds in trust for *C*, *B* will prevail, although both *B* and *C* paid value without notice.[14] The application is less clear where the prior claimant has only a right against the equitable owner, while the subsequent claimant, by a purported transfer of all the equitable owner's rights, can claim directly against the equitable obligor. For example, *B* has an equitable right against *A* and promises to assign to *C* and then assigns to *D*. In such a case Dean Ames would doubtless have thought that *D* should prevail,[15] arguing that *D* received rights against *A* for which he paid value and needed no assistance from *B* for their realization, and was, therefore, in substantially the same position as the transferee of a tangible chattel. Admittedly, however, where the prior claimant was also an assignee he would prevail over the subsequent assignee. So, if a *cestui que trust* assigns first to *C* and then to *D*, *C* will prevail.[16] Also, if the assignment to *C* is a partial one, such as an equitable rent charge, he will also prevail over *D*, a subsequent assignee to whom the *cestui* purported to transfer all of his rights.[17] It is difficult, although perhaps possible, to distinguish, as does Dean Ames, between a partial assignee of an equitable interest and one to whom the holder of an equitable interest is under a duty to convey, by way of promise or otherwise. No such difficult distinction as this need be drawn in protecting the innocent purchaser of a legal title, or of a legal *chose* in action in those jurisdictions where he is protected. All collateral equities, no matter of what nature, are cut off; while he takes subject to all prior legal claims of whatever nature.

It is impossible to say that there is any concensus of authority upon this question of the protection from collateral equities of an

[12] Lewin, Trusts (12th ed.) 920.

[13] Pritchard *v.* Warner's Assignee (1882) 4 Ky. L. R. 349; Deskins *v.* Big Sandy Co. (1905) 121 Ky. 601, 89 S. W. 695; Shropshire *etc.* Co. *v.* The Queen (1875) L. R. 7 H. L. C. 496; Allen *v.* Knight (1846) 5 Hare 272. In the last cited case the second assignee of the equitable interest bought in the legal title with notice of the prior equity. He was therefore not an innocent purchaser of the legal title. Aside from this complication, the case is a square holding that a subsequent innocent claimant for value of an equitable interest is postponed to a prior claimant against the same person. The cases are collected in American and English Ann. Cas., 1918 c. 456.

[14] Lewin, *op. cit.* 920; and see *supra,* footnote 13.

[15] Ames, "Purchase for Value without Notice," 1 Harvard Law Rev. 1, 11-12.

[16] Churchill *v.* Morse (1867) 23 Iowa 229.

[17] Phillips *v.* Phillips (1861) 4 De Gex, F. & J. 208; *cf.* Wailes *v.* Cooper (1852) 24 Miss. 208.

innocent purchaser for value of an equitable interest. Ordinarily, in those jurisdictions where a purchaser of a legal *chose* in action is not protected from collateral equities it would seem that the purchaser of an equitable interest would similarly be denied protection. But this is not necessarily the case. Thus in England, a purchaser of an equity of redemption has been protected from collateral equities,[18] although the purchaser of an equitable interest generally will not be so protected.[19] In those jurisdictions in this country where a purchaser of a *chose* in action is protected from collateral equities it would seem that the tendency to similarly protect the purchaser of an equitable interest would be strongest. Thus, if *A* has made a promise to *B* that is specifically enforceable and *B* promises to assign to *C* and assigns to *D*, since, if the contract had not given rise to equitable rights, *D* would have been protected, it would seem natural to extend that protection to cases where the contract gives rise to both legal and equitable rights. Peculiarly enough, however, in the five or six cases in which the validity of the defence of an innocent purchaser for value of an equitable interest has come up in such jurisdictions, it has been denied.[20] The principal case is to be added to this group of cases, for in Missouri it has been held that purchase for value of a *chose* in action is a good defence against a collateral incumbrancer.[21] In Canada a purchaser of an equitable interest has been said to be protected from what Lord Westbury in *Phillips* v. *Phillips*[22] called an equity as distinguished from an equitable interest.[23] Just what the distinction is has not been definitely set forth, and Dean Ames states that none exists.[24] It is submitted, however, that probably this distinction means nothing more than the one which Dean Ames would himself draw between one holding a right against an equitable owner and an assignee of the equitable owner, claiming against the equitable obligor.

The formal reason that is present in protecting an innocent purchaser of a legal *chose*, namely, that a court of equity will not inter-

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[18] Lane *v.* Jackson (1855) 20 Beav. 535; Penny *v.* Watts (1848) 2 De G. & Sm. 501.

[19] Cave *v.* Mackensie (1877) 46 L. J. Rep. Ch. 564; Capell *v.* Winter [1907] 2 Ch. 376; Cave *v.* Cave (1880) 15 Ch. Div. 639.

[20] Shoufe *v.* Griffiths (1892) 4 Wash. 161, 30 Pac. 93; Thomas *v.* Scougale (1916) 90 Wash. 162, 155 Pac. 847; Craig *v.* Leiper (Tenn. 1828) 2 Yerg. 193; Henry *v.* Black (1906) 213 Pa. 620, 63 Atl. 250; *cf.* Pope *v.* Gallant (N. C. 1839) 2 Dev. & B. Eq. 395. The protection of innocent purchasers of an equitable interest has been arrived at in some jurisdictions by the liberal construction of recording acts. See Edwards *v.* Brown (1887) 68 Tex. 329, 5 S. W. 87.

[21] Garland *v.* Harrison (1852) 17 Mo. 282; *cf.* Bartlett *v.* Eddy (1892) 49 Mo. App. 32; but *cf.* Johnson County *v.* Bryson (1887) 27 Mo. App. 341.

[22] *Supra*, footnote 17.

[23] See The Utterson Lumber Co. *v.* Renie (1892) 21 Sup. Ct. of Canada 218; Davison *v.* Wells (Upper Canada 1868) 15 Grant Ch. 89.

[24] Ames, "Purchase for Value Without Notice," *op. cit.* p. 2.

fere with one who has not unconscientiously acquired perfected legal rights, does not exist in favor of the purchaser of an equitable interest. The rights of both, the collateral incumbrancer and the subsequent assignee, are equally subjects of equity jurisdiction, and the only distinction is as to the completeness of the transfer. Such formal reasons, however, should not control legal holdings,[25] and it is clear they do not in this instance. The real question is, does the desirability of the free transfer of the particular *chose* in action or equitable interest in question warrant the protection of the transferee from one having collateral rights?[26] In England ordinarily the transferee for value of a *chose* in action is not protected from collateral incumbrancers, yet he is so protected where he purchases a *chose* whose transfer is of commercial importance, as a share of stock,[27] or an overdue negotiable instrument.[28] So, as to purchasers of equitable interests, though not ordinarily protected, they will be if they get an equity of redemption[29] which, even in jurisdictions retaining the common law conception of mortgages, must be conceded to have many of the attributes of legal ownership. That this method of approach is the correct one cannot be doubted, although it does not shape the law into the logical symmetry so pleasing to the theorist. The ground for disagreement with the principal case must exist, if at all, in the conception that it is desirable to have the equitable rights under a deed of trust freely transferable.

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[25] For an attempt to refute the position of Dean Ames, see Kenneson, "Purchasers for Value Without Notice," 23 Yale Law Journal, 194. Mr. Kenneson bases his article upon the premise that *choses* in action and equitable interests are inherently non-assignable.

[26] Cook, "The Alienability of Choses in Action," 30 Harvard Law Rev. 449, 477.

[27] Dodds *v.* Hill (1867) 2 H. & M. 424; *cf.* Wellbrand *v.* Walker (1911) 20 Manitoba 510.

[28] See *Ex parte* Swan (1868) L. R. 6 Eq. Cas. 344, 356.

[29] *Supra,* footnote 18.